

<b>Advisory Action Before the Filing of an Appeal Brief</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/611,292	GOMES DE OLIVEIRA, MARCELO

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 26 January 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1.  The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a)  The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.
- b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2.  The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3.  The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a)  They raise new issues that would require further consideration and/or search (see NOTE below);
  - (b)  They raise the issue of new matter (see NOTE below);
  - (c)  They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
  - (d)  They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4.  The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5.  Applicant's reply has overcome the following rejection(s): 112 second paragraph rejection of claims 1-3,8,12,17,18,21.
6.  Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7.  For purposes of appeal, the proposed amendment(s): a)  will not be entered, or b)  will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: \_\_\_\_\_.

Claim(s) rejected: 1,2,4-11,13-15 and 18-21.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8.  The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9.  The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10.  The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11.  The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.
12.  Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_
13.  Other: \_\_\_\_\_.

/ARIO ETIENNE/

Supervisory Patent Examiner, Art Unit 2457

Continuation of 11. does NOT place the application in condition for allowance because:

Applicant argues that the Examiners assertion that the equation of claim 1 is well known, is unsubstantiated. Applicant further argues that Examiner has failed to consider other factors that may affect the hypothetical "highway traffic setting" given by the Examiner.

In reply, Since Ju fails to explicitly teach the equation as it appears in the claim, it is appropriate to apply the broadest reasonable interpretation of the equation and view it in light of Ju. In interpreting the equation, only one example of values is sufficient to provide anticipation of the equation. In this regard, an example of where MaxCPUUtil is equal to CurrentCPUUtil is deemed as a situation which is well known in the art and sufficient to render the claim unpatentable. This example can be reworded as follows: "if current CPU utilization is equal to maximum CPU utilization, then no new channels can be supported by the CPU". In this sense, it appears that Applicant is trying to claim a well-known principle of "maximum capacity". Any real world situation that can demonstrate a physical limit of a resource (i.e. a CPU, a highway lane, a gas tank) can be used as an example of "maximum capacity". Whenever a resource has reached its "maximum capacity" then it can no longer handle anything more than its limit. The example given in the Office Action of 11/25/2008 was to give a simple example of "maximum capacity". Other factors, mentioned by the Applicant at the bottom of page 11 of the remarks, that may affect the "highway" example are irrelevant since they are beyond the scope of the claim.

The claim is broad and says nothing more than: "if current CPU utilization is at Maximum Capacity, then the CPU cannot handle any more load". This concept is old and well known in the art. Furthermore, it is even discussed by Ju (see at least column 5 line 49 - column 6 line 30, column 7 lines 50-67 and column 8 line 54 - column 9 line 15).

Therefore, although Ju fails to explicitly mention the equation listed in the claim, Ju does disclose and utilize the well known concept of "maximum capacity".